Re SATPAL SINGH, AN INFANT

[O.C.J. (Buttrose J.) May 17, 1957]

[Singapore — Originating Summons No. 114 of 1956]

Infants and Children — Guardianship — Care and custody of child of tender years — "Welfare" — Meaning of — Paramount consideration — Moral and physical welfare — Customs of the parties — Discretion of Court — Guardianship of Infants Ordinance (Cap.16), s.11 — R.S.C., O.52, r.23.

"Welfare" referred to in section 11 of the Guardianship of Infants Ordinance must be taken in its large signification as meaning that the welfare of the child as a whole must be considered. It is not merely a question whether the child will be happier in one place than in another but his general well-being. The welfare of the child, both moral and physical, should be the paramount consideration in awarding the custody of a child of tender years.

The court, in exercising its discretion under the Ordinance, should bear in mind the customs of the parties but should not consider itself bound by them as then it would not be exercising the discretion entrusted to it by the Ordinance.

Cases referred to:—

(1) *In re Thain,* (1926) 1 Ch. 689.
(2) *R. v. Praukrishna,* (1882) I.L.R. 8 Cal. 969.
(3) *Allen v. Allen,* 54 T.L.R. 418.
(4) *Willoughby v. Willoughby,* (1951) P. 184.

ORIGINATING SUMMONS.

H. A. Francis for the applicant.

K. K. Bezboruah for the respondents.

Cur. Adv. Vult.

The facts and arguments appear sufficiently from the judgment below.

Buttrose J.: — These proceedings were commenced by way of an Originating Summons taken out under the Guardianship of Infants Ordinance (Chapter 16) and O.52 r.23 of the Rules of the Supreme Court by the father who claims the custody of his child.

The first two prayers of the Summons ask:—

(1) that the custody and care of the infant, Satpal Singh, may be committed during his minority or until further order to the appellant, Ragbir Singh, being the infant's lawful and natural father;

(2) that the said Amar Kaur, the said infant's natural and lawful mother or the said Surjit Kaur do deliver up the infant, Satpal Singh, into the custody of the applicant.

The Originating Summons was served on the 2nd respondent (the mother of the 1st respondent) because it was alleged that the infant was living with her at the date of the issue of the Summons and at a different address from that of the 1st respondent.

The facts briefly were that the appellant and the 1st respondent were married according to Sikh religious rites at 234-A Tanjong Pagar Road on the 6th of January, 1952. There was one child of the marriage — the infant Satpal Singh — who was born on the 17th of November, 1952.

On the 28th of December, 1952 some 40 days after the birth of the child the 1st respondent left the applicant's house taking the infant with her and went to her parents' home at 234-A Tanjong Pagar Road. She has not returned to live with her husband and the infant has been in her custody and care and that of the 2nd respondent ever since.

There was a direct conflict of evidence as to the reason for the 1st respondent leaving the matrimonial home.

It was admitted by the 1st respondent and the evidence, in my view, clearly established, that it was the custom amongst Sikhs for the mother, some 40 days after the birth of her child, to take the child out to her parents residence for a short period for the purpose of carrying out certain ceremonies in connection with the birth and of showing the child to their relatives and friends. I am satisfied on the evidence that it was agreed that the 1st respondent should take the child to her parents' house for this purpose and that she and the child would return within a few days and that it constituted the sole reason for the 1st respondent leaving the matrimonial home with the infant Satpal Singh.

I do not accept the evidence of the 1st respondent on this matter nor do I consider that there is any substance in her complaint that she was treated with cruelty and assaulted by her husband and on the 28th of December, 1952 chased out of the house.

I am satisfied that her failure to return to her husband was not due, as she alleged, to his ill-treatment of her at all. Whatever the real reason — whether it was because she had to do the housework which, according to the evidence, was one of the reasons advanced by the 2nd respondent — I formed the opinion that once having returned to her mother's home and come under her influence again the 1st respondent never had any intention of returning to her husband. A course of action which, I am satisfied, had the fullest support and encouragement of the 2nd respondent.

According to the evidence of the applicant and his witnesses, which I have no hesitation in accepting in preference to that given by and on behalf of the respondents, efforts were made from January to August 1953 by the applicant and on his behalf to induce his wife to return both by direct approach to the respondents personally and by enlisting the aid of the Secretary and Committee of the Siri Guru Singh Sabha and also of the Social Welfare Committee without success. Finally on the 21st August, 1953 the applicant's father indicated to the Social Welfare Department that all efforts to effect a reconciliation had failed and that it was considered undesirable to intervene further at that stage as it might tend to aggravate matters and he hoped that time would remedy the situation. According to the evidence of Mr. Sundram, an Assistant Director of Social Welfare, Mehr Singh, the applicant's father, informed him that he thought it would be best if the 1st respondent returned of her own free will when wiser counsel prevailed and that the elders of his community had attempted a reconciliation without success. The applicant continued to persevere in his efforts to induce his wife to return up to the end of 1953 but she refused because according to the applicant she was under her mother's control.

There the matter, so far as the evidence goes, seems to have remained until the 19th of September, 1955, when the 1st respondent accompanied by the 2nd respondent called at the Social Welfare Department with the object of ascertaining whether the Department could dissolve the marriage or could draw up a Deed dissolving it by mutual consent. She was informed that the Department was unable to accede to her request and could do nothing in the matter.

It would appear therefore quite clear that at that date, namely, the 19th of September, 1955, the 1st respondent considered that her marriage with the applicant which had been contracted according to Sikh religious rites was still valid and subsisting: yet despite this fact, two days later, namely, on the 21st of September, 1955 the 1st respondent went through a ceremony of marriage purporting to be according to Sikh religious rites with one Gurdial Singh. Whether or not the ceremony was itself a valid marriage ceremony according to Sikh religious rites I am not, on the evidence before me, prepared to say. Counsel for the respondents admitted that it was not the same ceremony as the one conducted when the applicant and the 1st respondent were married nor were the same preliminaries apparently observed.

Neither the 1st respondent nor Gurdial Singh appear to have set much store by it in the first instance as the 1st respondent in her affidavit sworn on the 6th of October, 1956 stated that towards the end of 1955 she was forced to live with Gurdial Singh who agreed to look after her and the child while Gurdial Singh in his affidavit sworn on the same day stated that the 1st respondent had been staying with him from about September, 1955 and was still living with him.

Now according to the evidence of Doola Singh who was the President of the Sikh Temple, known as the Siri Guru Singh Sabha, from 1950 to 1954 it appeared that in the Sikh community if a husband does not take his wife away to live with him she can remarry. If however a wife is ill-treated by her husband she cannot remarry at will because the facts must be decided by arbitration, but if a husband orders his wife out of the home and tells her to stay away she can remarry of her own accord. Counsel for the respondents referred to *Mayne* on Hindu Law and Usage 11th Ed. where at page 175 the following passage appears:—

> "Among the Jat population of the Punjab, not only a widow, but a wife who has been deserted or put away by her husband, may marry again and will have all the rights of a lawful wife."

Both the applicant and the 1st respondent are Jats

In view however of the findings of fact at which I have arrived regarding the circumstances surrounding the 1st respondent leaving the matrimonial home and her failure to return the substantial effect of which is that she deserted her husband without cause, it would seem that she was not free to contract a second marriage according either to Hindu Law or the evidence of Doola Singh.

On the applicant learning that the 1st respondent was living with Gurdial Singh it became apparent that any hope of a reconciliation had gone and he at once took steps with a view to securing the custody of his child. The aid of the Social Welfare Department was again sought and both the applicant and his wife were interviewed separately and statements taken from them — Exhibits 3 and 4. The 1st respondent on the 24th of February, 1956, stated in unequivocal terms that she was not then prepared to surrender the custody of the child to the applicant but would consider doing so

when the child was 10 years old, namely, in November, 1962.

The present proceedings were subsequently instituted in September, 1956.

Now in determining the question of who is to have the custody of the child regard must be had to section 11 of the Guardianship of Infants Ordinance (Chapter 16). That section reads as follows:—

"11. The Court or a Judge in exercising the powers conferred by the foregoing provisions of this Ordinance shall have regard primarily to the welfare of the infant, and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them as the case may be."

In the case of *In re Thain*[1] Lord Hanworth in considering the words in section 1 of the Guardianship of Infants Act 1925 ("shall regard the welfare of the infant as the first and paramount consideration"), pointed out that the welfare referred to there must be taken in its large signification as meaning that the welfare of the child as a whole must be considered. It is not merely a question whether the child would be happier in one place than in another but of his general well-being.

Counsel for the applicant contended that the Court must also have regard to Hindu Law and Custom. He referred to *Mulla's* Principles of Hindu Law — 11th Ed. p.613-614 and to the Indian case of *Empress v. Praukrishna*[2] and submitted the principle established was that when the father is alive, he is entitled to the custody of his minor child, however young it may be, in preference to the mother.

On the other hand there is the statement in *Mayne* on Hindu Law and Usage — 11th Ed. at p.289 that in the case of a child of tender years it is in the interest of the child — whose welfare is the paramount consideration, rather than the rights of the parents — that the mother should have the custody. I think the proper way to treat the matter is this, that the Court, in exercising its discretion under the Guardianship of Infants Ordinance (Chapter 16) which now governs and regulates in general terms proceedings such as the present, should bear in mind the customs of the parties but should not consider itself bound by them as then it would not be exercising the discretion entrusted to it by the Ordinance.

Now the child is a boy and he will be 5 years old in November next. The mother has stated that she is prepared to consider surrendering the custody of the boy to his father in November, 1962 when he is 10 years old while the 2nd respondent has stated — Ex.9A — that she would certainly give him the custody if the Court so ordered.

Counsel for the respondents submitted that the proper order to be made was to grant the father the custody but allow the boy to remain under the care and control of his mother for another 2 years.

According to the evidence the boy is at present living with his mother and Gurdial Singh in a small cubicle on the first floor of 234-A Tanjong Pagar Road together with their nine-month-old baby and the possibility that they may have more children cannot be overlooked. In the next cubicle to them is the 1st respondent's mother and two brothers, the elder of whom was convicted of theft in the 7th Magistrate's Court on the 15th of October, 1956.

I am satisfied that when the 1st respondent went to live with Gurdial Singh at Lorong 18 Geylang in 1955 the boy was left with the 2nd respondent and spent the greater part if not all of that period under her control. The 2nd respondent has throughout, in my view, exercised a powerful and dominating influence in this matter.

I am bound to say that both the respondents and Gurdial Singh created a very unfavourable impression on my mind both in the witness box and from my observation of them during these proceedings and I found their evidence most unsatisfactory and unreliable. It was contended by Counsel for the respondents that the applicant was mentally deficient. I do not agree. I do not think he is very intelligent or mentally alert but he is certainly not mentally deficient. He was very nervous in the witness box but that I am satisfied was due entirely to his temperament and to the unusual position in which he found himself.

I considered that he was an honest and truthful witness and I formed a favourable impression of him and the witnesses called on his behalf. I have no hesitation in accepting their evidence.

Now section 11 first requires me to "have regard primarily to the welfare of the infant." I have to consider his welfare in the terms of his general well-being in life, not merely for the present but for the future.

In the case of *Allen v. Allen*[3] which was applied in *Willoughby v. Willoughby*[4] it was held that the word "welfare" in section 1 of the Guardianship of Infants Act, 1925, to which I have already referred, means physical as well as

moral welfare and that merely because a woman has once committed adultery, it cannot be said she is not a fit person, *vis-á-vis* one who has not, to have the care and control of a child.

Even if the ceremony of marriage between the 1st respondent and Gurdial Singh was invalid and she is and has been living in adultery with him then on the authority of the cases to which I have referred that would be no reason for depriving the mother of the care and control of the boy and I accordingly do not take it into consideration. Secondly the section requires me to "consider the wishes of the parents". Now the father has, through no fault of his own, been deprived of the custody, care and control of his son by the wrongful act of the mother in deserting her husband without cause and taking the boy away with her. The father has throughout exercised considerable patience and in my opinion behaved with commendable moderation and restraint and I attach considerable importance to his wishes in these circumstances. He is in a position to give his son the benefit of a comfortable and substantial home in surroundings vastly superior to those under which he is now living together with all the advantages of security, education and healthy family associations which he is not, in my opinion, at present enjoying or likely to enjoy.

In the interests of the child alone and having regard primarily to his welfare, both moral and physical, I have come to the conclusion that the sooner he is removed from his present environment, which I consider in every respect both undesirable and unsatisfactory, the better.

There must be an order in terms of the first two prayers of the summons. The question of access will be adjourned to be dealt with in Chambers.

The applicant must have his costs agreed at $400 of these proceedings.

Application allowed.

Solicitors: *Francis & Co.; K. K. Bezboruah.*

F. XAVIER v. K. KATHAMUTHU KONAR

[A.C.J. (Good J.) February 12, 1958]

[Ipoh — Civil Appeal No. 9 of 1957]

Moneylending — Note or memorandum of moneylenders' contract to be given to borrower — Moneylenders Ordinance, 1951, s.16(1).

The only point for decision in this appeal was whether or not the plaintiff (respondent) was precluded from enforcing the contract for the repayment of the loan and the security given in respect thereof if he failed to comply with the requirements of section 16(1) of the Moneylenders Ordinance, 1951.

Held: where a promissory note has been given as a security for a loan both the promissory note and the contract for the repayment of the loan in respect of which it was given are unenforceable by the lender against the borrower unless the lender has delivered an authenticated copy of the promissory note to the borrower before the money is lent as required by section 16(1) of the Ordinance.

Cases referred to:—

(1) *Ang Khye Pang v. Chop Ban Aik*, (1939) M.L.J. 282, 285.

(2) *Sockalingam v. Ramanayake*, (1937) 1 All E.R. 196, 201, P.C.

CIVIL APPEAL.

S. P. Seenivasagam for the appellant.

B. K. Das for the respondent.

Cur. Adv. Vult.

Good J.: — This is an appeal against the decision of the Ipoh Magistrate awarding a sum of $755.10 to the plaintiff/respondent which sum represented a loan of a principal sum of $600 and $155.10 interest secured by a promissory note executed by the defendant/appellant.

Only one point arises on this appeal, namely, whether or not the plaintiff/respondent was precluded from enforcing the contract for the repayment of the loan and the security given in respect thereof if he failed to comply with the requirements of section 16(1) of the Moneylenders Ordinance, 1951.

Mr. Das for the respondent argued that where a promissory note which complies with the requirements of section 16(4) is given by a borrower to a moneylender the promissory note is a sufficient note or memorandum of the contract and that section 16(1) does not apply. I cannot accept the latter part of this contention. All that section 16(4) says in effect is that where a promissory note which complies with certain requirements is given no other note or memorandum of the contract is necessary; but it only makes the promissory note a "sufficient note or memorandum of the contract *for the purpose of this section.*" One of the purposes of the section is to ensure that the borrower before committing himself by accepting the money is in possession of a duly authenticated copy of the note or memorandum of the contract; in other words, that he is protected by having in his possession a true record of the undertaking to which he has committed himself. There is abundance of authority for the proposition that the provisions of the Moneylenders Ordinance must be strictly